

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DAMIAN THOMAS BERNSTEIN,
Petitioner.

No. 2 CA-CR 2013-0312-PR
Filed January 7, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
Nos. CR20050198 and CR20053257
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Office of Kevin J. Oursland, Tucson
By Kevin J. Oursland
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Presiding Judge Vásquez concurred.

M I L L E R, Judge:

¶1 Damian Bernstein petitions this court for review of the trial court's order summarily denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Bernstein has not met his burden of demonstrating such abuse here.

¶2 In CR20050198, Bernstein pled guilty in March 2005 to child abuse and was placed on probation. He admitted violating his probation in August 2005 and again in May 2008, after which the trial court revoked his probation and sentenced him to a one-year prison term with sixty-five days of presentence incarceration credit. That sentence was to be consecutive to the sentence imposed "in the defendant's case in Lebanon County, P[ennsylvania]."

¶3 In CR20053257, Bernstein pled guilty in November 2008 to having discharged a firearm at a nonresidential structure in 2005. In December 2008, the trial court sentenced him to a seven-year, aggravated prison term. The sentencing minute entry stated Bernstein was entitled to 609 days of presentence incarceration credit. The transcript of the sentencing hearing, however, reflects that the court had determined Bernstein was entitled to 974 days of credit. The court stated it would apply 365 of those days to his sentence in CR20050198 and the remainder to his sentence in CR20053257.

¶4 In early 2010, apparently while incarcerated in Pennsylvania, Bernstein sent letters to the trial court asserting the

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365 days of credit in CR20050198 did not “make it to either sentencing order” and asking that the court make his Arizona sentences concurrent instead of consecutive. The trial court increased the presentence incarceration credit in CR20050198 from sixty-five to sixty-seven days but stated it would not consider the request for concurrent sentences and that if Bernstein “is now serving his Pennsylvania sentence . . . he is not entitled to the 609 days in CR-20053257” and denied his request for relief.

¶5 In December 2010, Bernstein filed notices of post-conviction relief in both cause numbers. Appointed counsel in CR20050198¹ filed a petition asserting that Bernstein was entitled to 781 days of presentence incarceration credit based on various periods of pretrial incarceration in Arizona and Pennsylvania but did not mention the 365 days of credit discussed at his sentencing in CR20053257. Although the state conceded the issue, the trial court concluded Bernstein was entitled to only 68 days of credit and otherwise denied relief. Bernstein did not seek review of the court’s ruling.

¶6 Bernstein filed new notices of post-conviction relief in both cause numbers in November 2012 and retained counsel filed identical petitions claiming he was entitled to the 365-day credit on his sentence in CR20050198 and his previous Rule 32 counsel had been ineffective in failing to raise that claim. He also argued the court was not permitted to modify his sentence in his previous Rule 32 proceeding.

¶7 The trial court summarily denied relief. The court determined that its comments regarding the 365 days of credit for the CR20050198 sentence at the sentencing for CR20053257 were “analogous to dicta” and of no legal effect and that it had correctly determined and memorialized Bernstein’s sentence in CR20053257.

¹Different counsel was appointed in CR20053257. Counsel did not file a petition for post-conviction relief and instead filed a motion to consolidate the two cause numbers, which the trial court granted in its order denying relief in CR20050198.

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The court also determined Bernstein's claims of ineffective assistance of counsel were not colorable and there had been "no unauthorized modification of [his] sentence." This petition for review followed.

¶8 On review, Bernstein repeats his claim that he is entitled to an additional 365 days of presentence credit. He now argues, however, that the credit must be applied against his sentence in CR20053257 because his sentence in CR20050198 has expired. Thus, he concludes, his sentence in CR20053257 is "in excess of his lawful sentence," constituting "fundamental error that must be corrected."²

¶9 The error Bernstein complains of, if it exists at all, arose at his sentencing in CR20053257 on December 19, 2008. A notice of post-conviction relief must be filed within ninety days of the entry of judgment and sentence. Ariz. R. Crim. P. 32.4(a). He did not raise the issue in any fashion until early 2010, and he did not raise the issue in his first post-conviction proceedings initiated in late 2010. Because he has not timely sought post-conviction relief and because he waived any issue not raised in his first Rule 32 proceedings, he is limited to raising claims pursuant to Rule 32.1(d), (e), (f), (g), or (h). Ariz. R. Crim. P. 32.2(a), 32.4(a).

¶10 Bernstein does not argue his claim falls within any of those subsections and instead asserts only that his sentence exceeds the maximum authorized by law pursuant to Rule 32.1(c). Nothing in the record suggests he currently is being held beyond the

² Bernstein abandons on review his claims of ineffective assistance of post-conviction counsel in both cause numbers and that the trial court lacked authority to modify his sentence in his first Rule 32 proceeding in CR20050198. Accordingly, we do not address them. See Ariz. R. Crim. P. 32.9(c)(1) (petition for review shall contain "[t]he reasons why the petition should be granted" and "specific references to the record"); *State v. Rodriguez*, 227 Ariz. 58, n.4, 251 P.3d 1045, 1048 n.4 (App. 2010) (declining to address argument not raised in petition for review).

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expiration of his sentence in either cause number.³ See Ariz. R. Crim. P. 32.1(d). And, to the extent he suggests his claim is not precluded because it constitutes fundamental error, he is incorrect. See *State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (holding illegal sentence claim precluded); *Swoopes*, 216 Ariz. 390, ¶ 2, 166 P.3d at 958 (fundamental error not excepted from preclusion). Accordingly, the trial court did not err in summarily rejecting Bernstein's sentencing claim. Cf. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) ("We are obliged to affirm the trial court's ruling if the result was legally correct for any reason.").

¶11 Although review is granted, relief is denied.

³The Arizona Department of Corrections Inmate Datasearch shows Bernstein's prison term has a "max end date" of April 15, 2019. Arizona Department of Corrections, <http://www.azcorrections.gov> (last visited Dec. 23, 2013).